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EXAMINER

DEBERADINIS, ROBERT L

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte NOEL LEE

Appeal 2010-002446
Application 09/735,697
Technology Center 2800

Before ALLEN R. MACDONALD, CARLA M. KRIVAK, and
THOMAS S. HAHN, *Administrative Patent Judges*.

HAHN, *Administrative Patent Judge*.

DECISION ON APPEAL¹

Appellant invokes our review under 35 U.S.C. § 134(a) from the final rejection of claims 49-62. We have jurisdiction under 35 U.S.C. § 6(b). An oral hearing was held on March 10, 2011. We affirm.

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Introduction

Appellant claims a structure having electric power outlets that are identified by different colored areas. Appellant also claims a method for using a power outlet strip that assigns “separate and distinct colored area[s] proximate” to each outlet.² Illustrative independent claims 49 and 58 read as follows:

49. An AC electrical power distribution system comprising:

a housing having a plurality of substantially identical AC power distribution outlets for connecting AC electrical power to a plurality of devices,

said housing having a plurality of colored areas for selectively identifying each outlet of said power distribution outlets,

each colored area of said colored areas on said housing being different in color from any other such colored area, and

each of said colored areas assigned to a different device.

58. A method for preventing confusion in users of a multiple outlet power strip having several identical outlets for providing power to a plurality of devices, comprising the steps of:

assigning a separate and distinct colored area proximate to each outlet for selectively identifying each outlet of said power strip,

assigning each colored area a different color from any other such colored area; and

providing colored indicia corresponding to the colors of said colored areas for identifying devices assigned to each colored area.

² See generally Abstract; Spec. 4:17-19; Fig. 2.

Rejections on Appeal

The Examiner, under 35 U.S.C. § 103(a), rejected:

1. Claims 49, 52, and 56-62 as unpatentable over Dwight (US Des. 401,220), and Barna (US 5,775,935) (Final Action 7-8);
2. Claims 50, 51, 54, and 55 as unpatentable over Dwight, Barna, and Liner (US 5,708,554) (Final Action 8-9); and
3. Claim 53 as unpatentable over Dwight, Barna, and Crane (US 5,899,761) (Final Action 9-10).

*Appellant's Contentions*³

The independent claims 49 and 58 are argued to be patentable over Dwight and Barna (App. Br. 10-18).⁴ Appellant “submits that the Examiner has (a) . . . failed to make a prima facie case of obviousness by not providing sufficient motivation to combine the Dwight and Barna references, (b) engaged in improper hindsight when combining the Dwight and Barna references and (c) improperly discounted secondary consideration evidence” (Reply Br. 2).⁵

³ Arguments that Appellant did not make in filed briefs are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii). Whereas, the arguments permitted during oral hearings are those relied upon in the briefs unless upon a showing of good cause a new argument is permitted based upon a recent relevant Board or Federal Circuit decision – no exception was requested for this appeal. 37 C.F.R. § 41.47(e).

⁴ Appellant contends the dependent claims do not stand or fall together (App. Br. 31). However, Appellant merely points out what the dependent claims recite (App. Br. 31-33), which statements are not considered arguments for separate patentability. 37 C.F.R. § 41.37(c)(1)(vii).

⁵ Citing the Manual of Patent Examining Procedure (MPEP) § 707.02, the Appellant asserts further arguments to apparently contend that this application should be treated as “special” (App. Br. 26-31). Designating an application “special” is a discretionary matter decided by the Supervisory

Issue on Appeal

The pivotal issue raised by Appellant’s arguments is whether the Examiner erred under 35 U.S.C. § 103(a) in rejecting claims 49 and 58 as being unpatentable over Dwight and Barna?

PRINCIPLES OF LAW

The Supreme Court has held that 35 U.S.C. § 103 forbids issuance of a patent for claimed subject matter that “‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement, the combination is obvious.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007) (citation omitted). The Court also explained that “when a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result.” *Id.* at 416 (citation omitted).

ANALYSIS

Obviousness Rejection Based on Dwight and Barna

With respect to the independent claims 49 and 58, the Examiner finds the Dwight design patent teaches “a design . . . disclosing a power strip housing having a plurality of colored areas (different hatching indicating different colors)” (Final Action 7). Despite the Appellant’s argument that Dwight in being a design patent lacks written description (Reply Br. 3), the Examiner’s consideration of Dwight drawings is admissible because it long

Primary Examiner (MPEP § 707.02). A denial may be remediable by petition to the Director, but is not a matter within the Board’s jurisdiction. *In re Mindick*, 371 F.2d 892, 894 (CCPA 1967). Accordingly, those arguments are not considered.

has been held that drawings can anticipate or make obvious a claimed invention. *See Jockmus v. Leviton*, 28 F.2d 812 (2d Cir. 1928).

The Dwight drawings show different hatching, i.e., symbolic lining, on ring shaped surfaces, while all other shown surfaces are marked with distinguishing stippling (*see, e.g.*, Dwight, Figs. 1 and 5). MPEP § 1503.02 V, which does not have the force of law or regulation, does indicate practices for (i) showing color by marking drawn structure surfaces with symbolic lining in accordance with MPEP § 608.02, and (ii) identifying drawings as being lined for color with a statement that “should be inserted in the [design patent] specification” to avoid possible confusion. The Dwight patent does not include such a statement. Absence of the statement we find to be harmless because the record is silent as to there being consequent confusion. For example, the Appellant has repeatedly acknowledged that the “Dwight apparatus . . . comprises thin *colored* rings . . .” (App. Br. 19; Reply Brief 3 (emphasis added)). Further, the symbolic lines shown on Dwight’s ring structure surfaces (*see* Fig. 1, a perspective view, and Fig. 5, a right side elevation view) comply with the practice set out in MPEP § 608.02 for showing different colors. Accordingly, we agree with and adopt the Examiner’s findings from Dwight’s drawings set out *supra*.

From our review of Barna, we also agree with and adopt the Examiner’s findings as to teachings from that reference (Final Action 7-8).

Exemplary of Appellant’s contentions is the argument that “[e]ven if the concept of color-coding, in general, has been known, the concept of solid color-coding has never been applied to substantially identical outlets of a plug strip apparatus until the present invention” (App. Br. 14). First, the Examiner and we find Barna teaches color-coding (Final Action 7-8), and,

therefore, the concept is old. Second, the Examiner and we agree that the appealed claims nowhere recite “solid color-coding” (Ans. 6). Finally, we find the Examiner’s reasoning for combining references to be rational despite Appellant’s allusion to some requirement for Appellant’s “invention,” which we understand is asserted to support an argument that the Examiner applied improper hindsight. More specifically, Appellant argues that “the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references” (Reply Br. 4 (citation omitted)). The Examiner’s reasoning for combining Dwight and Barna is “[t]he motivation . . . to provide an indication as to which device is not plugged into the power strip ([Barna] column 6, lines 27, 28)” (Final Action 8).⁶ We find from the record, including the cited Barna disclosures, that the Examiner’s explained combination relies on rational utilization of prior art elements known in the field to yield a predictable result, and, as such, the combination is obvious. *KSR*, 550 U.S. at 416, 417.

Appellant further filed declarations under 37 C.F.R. §§ 1.131(a) and 1.132 setting out testimony concerning a date of conception, asserted commercial success, and psychological significance of solidly colored surfaces of high chroma. We reviewed these declarations, and also reviewed the Examiner’s described considerations of the declarations, findings, and

⁶ The cited Barna disclosure reads: “By entirely surrounding a connection port with a color coded section or item[] a user may more readily identify the connection in which a connection cable should be inserted” (Col. 6, ll. 27-28).

identified reasoning for why they are not persuasive (Ans. 8-12). We agree with and adopt the Examiner's findings and conclusions.

For the forgoing reasons we sustain the rejection of independent claims 49 and 58. We also sustain the rejections of all the respective dependent claims 52, 56, 57, and 59-62 that are not separately argued.

Claims 50, 51, and 53-55

Appellant contends that claims 50, 51, and 53-55 are patentable because of the above addressed patentability arguments for independent base claim 49, without further argument (App. Br. 21-26, 31-33). Consequently for the reasons explained *supra*, we sustain the rejections of these claims.

CONCLUSIONS

1. The Examiner did not err in rejecting claims 49, 52, and 56-62, under 35 U.S.C. § 103(a), as being unpatentable over Dwight and Barna.
2. The Examiner did not err in rejecting claims 50, 51, 54, and 55, under 35 U.S.C. § 103(a), as being unpatentable over Dwight, Barna, and Liner.
3. The Examiner did not err in rejecting claim 53, under 35 U.S.C. § 103(a), as being unpatentable over Dwight, Barna, and Crane.
4. Claims 49-62 are not patentable.

DECISION

The Examiner's rejections of claims 49-62 are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

Appeal 2010-002446
Application 09/735,697

gvw

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